No. 11,046

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ESTATE OF ETHEL M. DUVAL, deceased, by THOMAS M. ROBINSON, JR., and WESTON SHATTUCK ROBINSON, as executors of her last will and testament,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONERS' PETITION FOR A REHEARING.

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To the Honorable Francis A. Garrecht, Presiding Judge, and to the Honorable Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Come now Thomas M. Robinson, Jr. and Weston Shattuck Robinson, as executors of the last will and testament of Ethel M. DuVal, deceased, petitioners herein, and respectfully petition this Court that the decision of this Court, rendered herein November 24, 1945, be set aside and a rehearing of the cause be granted on each and all of the following grounds:

(a) This Court has misconceived the meaning and effect of *Lyeth v. Hoey,* 305 U. S. 188, which is not author-

ity for the proposition stated by the Court, that the revenue acts are intended to have a uniform application "and *to bring into the gross estate what is fundamentally the same in all states, not colored by local characterization*", the true rule being that the existence of a property right to be included in the gross estate *must be determined by the local law.*

(b) The Court has apparently overlooked entirely the requirement that when assets are included in the gross estate the only basis on which they can be included is their "*fair market value*" at the date of death and the fact that the maker and co-guarantor of the note were solvent and able to pay does not prove "*fair market value*" as defined by Reg. 105, Sec. 81.0(a), or justify the exclusion of evidence of fair market value.

(All emphasis herein is ours unless otherwise stated.)

I.

THE COURT'S MISCONCEPTION OF LYETH v. HOEY.

In its opinion, citing *Lyeth v. Hoey,* 305 U. S. 188, this Court said:

> "* * * The revenue acts are intended to have a uniform application *and to bring into the gross estate what is fundamentally the same in all states; not colored by local characterization.* * * *"

The italicized portion of this statement, we respectfully submit, is not the law. *The local law must be looked to* in order to ascertain the *existence of property rights* which are subject to inclusion in the gross estate under I.R.C. Sec. 811 and Reg. 105, Sec. 81.0(a) et seq.

The Supreme Court in its later decision of *Helvering v. Stuart* (1942), 317 U. S. 154, explains *Lyeth v. Hoey* and says that it determined only *what existing interests should be taxed,* and *not* what interests or rights *had been created.* Thus the Court, speaking of the statute making the taxability of trust income depend upon the possibility of revesting the trust property, or the distribution of the trust income to the settlor, said (p. 162):

> "* * * Congress has selected an event, that is the receipt or distribution of trust funds by or to a grantor, *normally brought about by local law* and has directed a tax to be levied if that event may occur. Whether that event may occur depends upon the interpretation placed on the terms of the instrument by the local law. *Once rights are obtained by local law,* whatever they may be called, *these rights* are subject to the *federal definition of taxability.* Recently in dealing with the estate tax levied upon the value of property passing under a general power, we said *'state law creates legal interests and rights.* The federal revenue acts designate what interests, or rights, *so created,* shall be taxed.' *Morgan v. Commissioner,* 309 U. S. 78 (a case dealing with the taxability at death of property passing under a general power of appointment). In this case, *as in Lyeth v. Hoey,* we were determining what interests or rights should be taxed, *not what interests or rights had been created* and therefore applied the federal rule (citing cases). In this view, the rules of law to be applied are those of Illinois. * * *"

It is submitted that *Helvering v. Stuart* shows plainly the limitation upon the holding in *Lyeth v. Hoey.*

Under I.R.C. Sec. 811(a) all *"property"* of the decedent *to the extent of his interest therein at the time of his death*

is includible in the gross estate. Either by express reference or necessary implication, the statute requires us to look to the local law to ascertain *what is includible property.* (See *Crooks v. Harrelson,* 282 U. S. 55, holding that real estate was not includible in decedent's gross estate because, under the state law, it was not subject to the payment of the charges against the estate or the expenses of distribution.)

No considerations of uniform application of federal tax laws justify disregarding the local law, to ascertain the existence of property includible in the gross estate, or justify including in the gross estate that which is not property, in existence at the date of decedent's death.

It makes no difference what the law is in other states,—here the law of California governs with respect to what are a guarantor's rights over and it is *settled law* in California that a guarantor's rights of reimbursement, contribution and subrogation *do not exist* until the guarantor *actually* pays the guaranteed debt. (*Wills v. Woolner,* 21 Cal. App. 528,—reimbursement; *Pacific Freight Lines v. Pioneer Express Co.,* 39 Cal. App. (2d) 609,—contribution; and *Myers v. Bank of America,* 11 Cal. (2d) 92,—subrogation, and the other cases cited at pages 30-32 of Appellant's Opening Brief.)

We are aware of what this Court said in the *Parrott* case, but we wish nevertheless to point out that although the three cases there cited by this Court from states other than California do support the rule in Massachusetts, Indiana and Arkansas, *that the obligation to make contribution exists from the date of the execution of the note and mortgage* (*Rice v. Southgate,* 82 Mass. 142; *Griffen v.*

Long, 96 Ark. 268, and *Norris v. Churchill,* 20 Ind. App. 668), *these cases are directly contrary to and do not state the controlling California rule.*

The *Parrott* case says that the co-maker of the note and co-owner of the mortgaged property and the co-borrower (the decedent's brother) at the time of the decedent's death "was under *contractual obligation* to pay his half of the debt and to repay to her any sum that she might pay in excess of her one-half of the amount of their joint debt, *and that obligation existed from the date of the execution of the note and mortgage and was property.*"

But in the case at bar, the co-guarantor was not under any *contractual* obligation to make contribution and could not have any such *contractual* obligation to contribute until she paid more than her share, *at which time,*—the time of payment, *a new and implied contract* would arise on the basis of which the right to contribution would depend (*Pacific Freight Lines v. Pioneer Express Co.,* supra; *Jackson v. Lacy,* 37 Cal. App. (2d) 551; *Richter v. Henningsen,* 110 Cal. 530).

It is therefore respectfully submitted that this Court has misconceived the meaning and effect of *Lyeth v. Hoey* (supra) and that no considerations of uniform application of tax laws or otherwise, justify the Court in ignoring the local law to determine what rights over, if any, existed at the date of death, or in including in the gross estate that which is not property under the local law.

II.

THE COURT HAS OVERLOOKED THE REQUIREMENTS OF REG. 105, SEC. 81.0(a).

This Court in its opinion, in justifying the Tax Court's exclusion of the petitioners' evidence offered to prove lack of *fair market value* of the rights over said that

> "No difficulty is encountered in fixing the *value* of rights over because it was stipulated that the maker and co-guarantor were solvent and that where, as here, the company was able to pay the debt, there is no reason to encumber the record by the introduction of opinion evidence as to the value. Such evidence would have been of no assistance to the Tax Court."

"Value" *at the date of death only* and not at any subsequent date is the "value" with which we are concerned. (*Ithaca Trust Co. v. U. S.* (1929), 279 U. S. 151, 155; *Wells Fargo Bank & Union Tr. Co. v. Comm'r.* (CCA-9), 145 Fed. (2d) 132.) But that is not all.

Reg. 105, Sec. 81.0(a), expounding I.R.C. Sec. 811, says that

> "(a) The value of every item of *property* includible in the gross estate is the *fair market value thereof* at the time of decedent's death. * * *"

The section then defines *"fair market value"* as

> "The *price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell.* * * *"

Thus "value" in the Internal Revenue Code means *"fair market value",* as thus defined,—the *price* that would be paid, etc.

Subdivisions (b) to (g) inclusive of Sec. 81.0(a) each specify the method of evaluation of some specific type of property and subdivision (h) provides:

> "(h) Other Property. Any property not specifically treated in this section should be valued *in accordance with the rule laid down in subsection (a) hereof.* * * *"

Since none of the other subdivisions specifies a method for valuing "rights over", they can be included in the gross estate *only* on the basis of what *fair market value,* if any, which they had at decedent's death.

When *Commissioner v. Wragg* (CCA-1), 141 Fed. (2d) 638, refers to the "value" of "rights over" as property, it *must* refer to their *"fair market value"* unless Reg. 105, Sec. 81.0(a), is meaningless.

The petitioners did not stipulate that the rights over either existed or had any fair market value. They merely stipulated that the maker and co-guarantor were solvent and able to pay, *a vastly different* thing from stipulating either as to the *existence* or *amount* of *"fair market value"* of rights over, as such value is defined in the regulations.

At the trial, the Tax Court *arbitrarily* and *capriciously* sustained an objection to petitioners' offered testimony relating to the "fair market value" of the rights over, at the time of death, the Tax Court's arbitrary action being well demonstrated by its answer to counsel's question in which he asked upon which of two grounds the Tax Court sustained the objection. The judge replied: *"Let the record stand as it is."*

There were no rights over in existence under California law at the date of death and to say, as this Court says, that decedent had a *"right to a right"* is but to beg the

question and to admit that any ultimate right of contribution was not in existence at the time of decedent's death and was therefore not includible in the gross estate. (*Skinker,* 13 B.T.A. 846; *Rodiek,* 33 B.T.A. 1020; see *U. S. v. Safety Car Heating & Lighting Co.,* 297 U. S. 881.) The *"right to a right" which latter right was not in existence when decedent died and which might possibly come into being at some remote and indeterminate time after decedent's death is a very hazy and indefinite thing, hardly capable of evaluation as of the date of death by the required standards of evaluation as fixed by the law.*

Opinion evidence is perhaps the only evidence that could have been of any assistance to the Tax Court in arriving at the only basis permitted by the Internal Revenue Code for the inclusion of rights over (if they existed) in the gross estate, namely, their *"fair market value"* as above defined.

As a matter of fact, as this Court has held, opinion evidence is frequently the only evidence that can be used to value intangibles. (See *Citrus Soap Co. etc. v. Lucas* (CCA-9), 42 Fed. (2d) 372, where opinion evidence was sustained as competently and satisfactorily establishing the value of good will.)

It makes no difference that there were no buyers for the "rights over" (if they existed) because, as the Court said in *Bank of California v. Comm'r.* (CCA-9), 133 Fed. (2d) 428 (a case dealing with the valuation of a non-assignable claim for refund where it was questioned whether a non-assignable asset could have a fair *market* value):

> "Article 13 defines the term 'fair market value' as 'the *price* at which the property would change hands between a willing buyer and a willing seller, neither

> being under any compulsion to buy or sell'. *In applying this definition we are required to assume the existence of a willing buyer and a willing seller, regardless of whether they actually existed or not, and to assume that the property could and would change hands even though such a change could not in fact occur.''*

We still must use the formula of "fair market value".

The very definition and concept of "fair market value" in the regulations obviously means more than that the maker and co-maker were solvent and able to pay at the time of decedent's death. What *price* would be developed in the *market* between the willing *buyer* and the willing *seller* is quite another thing.

From a purely practical point of view, *how, on the date of decedent's death, without recourse to opinion evidence, could it be determined at what price, if any, the "right to a right" of contribution, subrogation or reimbursement which might subsequently arise, would have changed hands between a willing seller and a willing buyer?*

The "right to a right" could only be a right to a *right obviously not in existence at decedent's death* and which *might* subsequently, at some unknown date arise *if* the decedent's estate paid the guaranteed debt.

Therefore, what rights decedent's estate *might have at some indeterminate* time after decedent's death should not be taken into consideration in fixing the gross estate (*Wells Fargo Bank & Union Tr. Co. v. Comm'r.* (supra)).

It is respectfully submitted that the Court's opinion shows on its face that the statutory definition of *"fair*

market value'' must not have been in the mind of the Court if it considered that "ability to pay'' was fully equivalent to the *price* at which these alleged rights would have *changed* hands in the market between a willing seller and a willing buyer.

For the reasons aforesaid, the petitioners pray that the Court's aforesaid decision may be set aside and a rehearing granted.

Dated, Oakland, California,
December 21, 1945.

M. W. Dobrzensky,
James H. Anglim,
Attorneys for Petitioners.

Certificate of Counsel.

I hereby certify that I am of counsel for petitioners herein and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, Oakland, California,
December 21, 1945.

M. W. Dobrzensky,
Of Counsel for Petitioners.